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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10  
11 LISAMARIE RAYZBERG,  
12 Plaintiff,  
13

14  
15 vs.

16 COUNTY OF LOS ANGELES, et al.,  
17 Defendants.  
18  
19  
20  
21  
22  
23  
24  
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26  
27  
28

No. 2:23-cv-02585-DMG-JC

**Honorable Dolly Gee**

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S EX PARTE  
APPLICATION TO STRIKE  
DEFENDANTS' RESPONSE TO  
OPPOSITON TO DEFENDANTS'  
SUMMARY JUDGMENT MOTION  
AND ALTERNATIVELY,  
SUMMARY ADJUDICATION;  
AND  
DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S REQUEST TO FILE  
A SUR-REPLY**

Summary Judgment hearing: 04/19/24  
Trial Date: 07/09/24  
Pretrial Conference: 06/11/24  
Motion Cut-Off: 02/23/24  
Dispositive Motion Cut-Off: 04/12/24

**MEMORANDUM OF POINTS AND AUTHORITIES**

**EX PARTE APPLICATIONS ARE FOR SOLELY  
FOR EXTRAORDINARY RELIEF**

This Court's Standing Order provides that Ex Parte applications are solely for extraordinary relief and should be used with discretion. Sanctions may be imposed for misuse of ex parte applications. See *Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F.Supp. 488 (C.D. Cal. 1995).

To justify ex parte relief, the moving party must establish: (1) that their cause of action will be irreparably prejudiced if the underlying motion is heard according to regular noticed procedures; and (2) that they are without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect. *Id.* at 492-93.

In *Horne v. Wells Fargo Bank, N.A.*, 969 F.Supp. 1203 (C.D. Cal. 2013), the district court discussed the legal standard for ex parte applications: The "opportunities for legitimate ex parte applications are extremely limited." *In re Intermagnetics America, Inc.*, 101 B.R. 191, 193 (D.D. Cal. 1989); see also *Mission Power Engineering, supra* at 488 (stating that to be proper, an ex parte application must demonstrate that there is good cause to allow the moving party to "go to the head of the line in front of all other litigants and receive special treatment").

1 Plaintiff's Ex Parte application fails to justify ex parte relief -- Plaintiff failed  
2 to establish the elements required for relief. Plaintiff has failed to show that her  
3 cause of action will be "irreparably prejudiced" if this ex parte is not heard. Plaintiff  
4 has not shown that she is without fault in creating the crisis that requires ex parte  
5 relief. Plaintiff was well aware of the *Scott* case – that in a summary judgment  
6 motion the video evidence is viewed in the light depicted by the videos. Plaintiff was  
7 not without fault – Plaintiff did not address this standard in her Opposition.  
8 Plaintiff's strategic miscalculation not to address this issue is not excusable.  
9  
10  
11

### 12 **COURT'S DISFAVOR SUR-REPLIES**

13

14 A surreply, or sur-reply, is an additional reply to a motion filed after the  
15 motion has already been fully briefed. The Local rules provide for a motion, an  
16 opposition, and a reply. Neither the Local Rules nor the Federal Rules provide a  
17 right to file a surreply.  
18

19 A district court may allow a surreply to be filed, but only "where a valid reason  
20 for such additional briefing exists, such as where the movant raises new arguments in  
21 its reply brief." *Hill v. England*, 2005 WL 3031136, P. 1 (E.D. Cal. 2005.)  
22

23 While courts are required to provide pro se litigants leniency, the court  
24 generally views motions for leave to file a surreply with disfavor and will not  
25 consider granting a motion seeking leave to file a surreply absent good cause. Good  
26 cause is absent in this case.  
27  
28

Plaintiff's claim that she was prejudiced because she did not find it necessary to address the applicability of *Scott v Harris* "to the issues at hand" in this case involving BWC videos is her own strategic miscalculation.

Plaintiff's Ex Parte requests that this Court strike Defendants' reply (Response) and/or permit Plaintiff to file a sur-reply on the grounds that Defendants' Response "prejudiced" the Plaintiff,

The Ex Parte's sole claim of prejudice to Plaintiff is "because she did not find it necessary to address the applicability of this case law to the issues at hand and requests the Court to permit a sur-reply to adequately challenge its applicability to these facts." (Ex Parte, page 3, § 4.) Plaintiff claims that the video supports her version. Plaintiff could have addressed the *Scott* case in her Opposition as to whether a particular version was blatantly contradicted by the videos, especially since the Ex Parte specifically argues that "defendant's version of facts" is "entirely contradicted by the video evidence." (Ex Parte, Page 4, lines 18-20.)

The case law to which Plaintiff refers is *Scott v. Harris*, 550 U.S. 372 (2007) which is a standard analysis for District Courts when summary judgment motions involve videos which capture "material facts" in the case. Thus, it appears that Plaintiff's decision not to specifically address the video evidence was a strategic miscalculation.

1 Defendants' Response did not involve new issues, new evidence, or new  
2 arguments. In *Garcia v Biter*, 95 F.Supp.3d 1131 (E.D. Cal. 2016), the Court  
3 declared:  
4

5 "Here Plaintiff seeks leave to file a surreply to address "new  
6 arguments" and evidence raised by Defendants for the first time in  
7 their reply. (Do. 73.)

8 Defendant, however, did not provide any new evidence in the reply to  
9 Plaintiff's Opposition nor did Defendants raise new issues or  
10 arguments. Rather, Defendants cited to the record, their Motion and  
11 various legal authorities and substantively addressed those new issues  
raised by Plaintiff in his Opposition." *Id.* at 1134.

12 In the instant case, at all times the "issues at hand" involve BWC videos that  
13 depict Defendants' interactions with Plaintiff. Both sides in this case contend that  
14 the videos support their position. Defendants continued with their analysis of the  
15 video evidence in their Response.  
16

17 Plaintiff's attorney is a seasoned criminal defense/civil rights litigator and  
18 knows that *Scott v. Harris*, 550 U.S. 372 (2007) applies to motions for summary  
19 judgment which involve video evidence. Based on *Scott*, the Court views the facts in  
20 in the light depicted in the videos.  
21

22 In fact, Plaintiff's attorney represents Plaintiff M.L.H. (a minor) in  
23 *Estate of Hernandez by and through Hernandez v City of Los Angeles*, 2024 WL  
24 1203884 (9<sup>th</sup> Cir. 2024). In that case, Defendants brought a motion for summary  
25 judgment, Plaintiff argued the video evidence, and the court reviewed the evidence in  
26 rendering a decision. The Court granted Defendants' motion for summary judgment.  
27  
28

1 And just three weeks ago, the Ninth Circuit (on March 21, 2024) affirmed the  
2 District Court's granting Defendants' motion for summary judgment as to all federal  
3 claims.  
4

5 In *Hernandez*, Plaintiff's Opposition (by Narine Mkrtchyan) at great length  
6 cites video evidence in support of Plaintiff's version, and argues that *Scott v. Harris*  
7

8 "is inapposite here, because Plaintiff's version of facts, is supported, not  
9 plainly contradicted by the video evidence and a reasonable jury would  
10 conclude based entirely on video that ....." (Opposition, p. 21.)

11 In *Hernandez*, 2021 WL 3206042 (C.D. Cal. 2021), the District Court's  
12 lengthy Order does not mention the *Scott* case, but confirms that the Court relied on  
13 video evidence in determining the material facts:  
14

15 "Estate Plaintiffs dispute Defendants' characterization of several facts  
16 in the DSUF. (Estate Statement of Genuine Disputes, Dkt. No. 100.)  
17 Those disputes are insufficient to create a genuine issue of material  
18 fact. *See Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1084 (E.D. Cal.  
19 2016) ("The court's decision [on a summary judgment motion] relies  
20 on the evidence submitted rather than how that evidence is  
21 characterized in the statements."). This is particularly true when the  
22 relevant events are captured on video. (foonote 2) (emphasis added).  
23

24 In *Hernandez*, the Ninth Circuit's Opinion (**for Publication**) 2024 WL  
25 1203884 (9<sup>th</sup> Cir. 2024) (dated March 21, 2024) affirms the District Court's Order  
26 granting Defendants' motion for summary judgment as to all federal claims. The  
27 Ninth Circuit clearly relied on the video evidence in rendering its Opinion:  
28

- Video footage from the patrol car and from McBride's body camera captured  
much of what then transpired. (Opinion, p. 2.)



- 1 • FOOTNOTE 1: Because no party contends these videotapes were “doctored”  
2 or “altered,” or that they lack foundation, we “view[] the facts in the light  
3 depicted by the videotape.” See *Scott v. Harris*, 550 U.S. 372, 378, 380– 81  
4 (2007). (emphasis added) (Opinion, p. 9)
- 5 • However, to the extent that a fact is not clearly established by the videotape,  
6 we view the evidence “in the light most favorable to the nonmoving part[ies],”  
7 i.e., Plaintiffs. *Id.* at 380. (Opinion, p. 6.)
- 8 • **FOOTNOTE 2: M.L.H.’s assertion that Hernandez was unarmed during**  
9 **the latter part of the incident is thus “blatantly contradicted” by the**  
10 **videotape. *Scott*, 550 U.S. at 380–81. (Opinion, p. 9.)**
- 11 • Applying these principles to this case, we agree with the district court that the  
12 undisputed video evidence confirms that, at the time McBride fired the second  
13 volley of shots, the “threat” that Hernandez posed had not yet “ended.”  
14 *Plumhoff*, 572 U.S. at 777. (emphasis added) (Opinion, p. 5.)
- 15 • This case differs from *Zion as* to each of these critical facts. The video  
16 evidence in this case clearly shows that, even after the fourth shot, Hernandez  
17 continuously moved in a way that gave the objective appearance of trying to  
18 get up; the video evidence shows that Hernandez never dropped his weapon  
19 and still had it in his hand at the end of the episode; and McBride’s continued  
20 instructions to Hernandez to drop the knife confirm that she continued to  
21 believe that he was armed. (Opinion, p. 7)

22 **Plaintiff cannot show that Defendants’ Response prejudiced Plaintiff in any**  
23 **way. Plaintiff knew about the *Scott* case and that District Courts review the**  
24 **evidence in the light as depicted in the videos. Plaintiff had an opportunity to**  
25 **fully make such arguments in her Opposition.**

26 Moreover, Plaintiff’s contention that the Response had new arguments/issues  
27 is unfounded. Plaintiff’s Ex Parte claims that “Plaintiff has in fact relied heavily on  
28 the BWC recordings in much detail to support her theory of the case.” (Ex Parte, p.  
4, lines 14-15.) Thereafter, Plaintiff asserts that “if the Court were even to rely on

1 *Scott's* holding, it would simply reject defendants' version of the facts as it is  
2 entirely contradicted by the video evidence.." Based on the video evidence,  
3  
4 Defendants continue to dispute Plaintiff's claim that the videos support her version.

5 In response to Defendants' motion for summary judgment, Plaintiff filed a  
6  
7 huge Opposition with over 1,000 pages of exhibits. Defendants filed a Response.

8 With respect to Defendants' Motion for Summary Judgment, an important  
9  
10 part of the record is the BWC videos Exhibits B, C, D, E, F, G, H, and I (and photos  
11 Exhibits L and M).

12 In the motion for summary judgment, Defendants contend that along with their  
13  
14 Declarations, the BWC videos show that Defendants' conduct was that of a  
15 "reasonable officer" during their interactions with Plaintiff on May 15, 2021. Such  
16  
17 videos are highly relevant in defending Defendants against Plaintiff's spurious claims  
18 against them, as alleged with particularity in Plaintiff's Complaint.

19 Plaintiff's Opposition contends that the BWC videos support Plaintiff's  
20  
21 version. However, Plaintiff's Opposition does not cite to particular video evidence to  
22  
23 support the claims against Defendants that are alleged with particularity in Plaintiff's  
24 Complaint.

25 Accordingly, this necessitated that Defendants' Response set forth those  
26  
27 material facts alleged in the "verified" Complaint, and provide a description as to  
28 how, and in what manner, the BWC videos do not show what Plaintiff alleges in her  
Complaint.



1 For example, Defendants' Response cites to the Complaint wherein it alleges  
2 that Defendant Reynal --

3  
4 "maliciously and without warning grabbed RAYZBERG's hand, pulled her  
5 out of her car by spilling the coffee she had in her hands, and immediately  
6 handcuffed her by twisting, pulling and locking her arms behind her in a  
7 forceful manner hurting and injuring her shoulder. RAYBERG immediately  
8 felt pain in her shoulder and complained "You're hurting me? Why are you  
9 treating me this way? What is going on?" (Complaint, § 7, lines 19-24,  
submitted in Responses to Interrogatories, verified by Plaintiff under penalty  
of perjury.)"

10 Instead, Defendants' Response describes what the **BWC footage** shows --

11  
12 Prior to handcuffing, Plaintiff was standing outside her vehicle. Deputy  
13 Reynal told her not to go anywhere. Plaintiff informed him that she was  
14 not being detained. Deputy Reynal told her that she was being detained.  
15 Deputy Reynal requested her name and repeatedly requested her ID  
16 telling her he wanted to verify that it was not stolen. Plaintiff denied  
17 being uncooperative because she told him that it was "her vehicle".  
18 Three times Deputy Reynal told Plaintiff to place her hands on the hood  
19 of his patrol vehicle, or he would place her in handcuffs. Plaintiff  
20 wanted Deputy Reynal to SHOW her something that said it was stolen.  
21 Deputy Reynal stated that he did not understand why nobody's  
22 cooperating. Twice Deputy Reynal told Plaintiff to place her hands  
23 behind her back. Deputy Reynal handcuffed Plaintiff who continued to  
24 say that she didn't do anything wrong. Deputy Reynal confirmed that he  
was recording, and confirmed to Plaintiff that he had asked for her ID.  
**Exhibit B – Reynal BWC footage** blatantly contradicts "Plaintiff's  
version" -- Deputy Reynal did not grab Plaintiff out of her car, and  
Plaintiff never yelled out to Deputy Reynal that he had injured her  
during the handcuffing.

25 Plaintiff's Opposition claims that the BWC videos supports Plaintiff's version,  
26 but Defendants disagree. In Response, Defendants specifically compared the  
27 allegations in the Complaint to what the videos show. Defendants' Summary  
28 Judgment Motion pierced the pleadings -- those portions of Plaintiff's alleged factual

1 account that are blatantly contradicted by the BWC videos (record) and which  
2 should be disregarded. Due to the absence of material factual disputes, the objective  
3 reasonableness of the Defendants' conduct in this case is a "pure question of law."  
4

5 Plaintiff contends that that she is entitled to file a "sur-reply," alleging that the  
6 Defendants' Response includes "new arguments/issues". Instead, Defendants'  
7 Response appropriately "responds" to Plaintiff's Opposition and continues  
8 expanding on the arguments/issues set forth in Defendants' motion for summary  
9 judgment. Both Defendants and Plaintiff argue that the video evidence supports  
10 "their" version. In this regard, Defendants continue to argue that the BWC videos  
11 factually support Defendants' position, and contradict the claims alleged in  
12 Plaintiff's Complaint.  
13  
14  
15

16 And quite telling is Plaintiff's revelation in her Ex Parte wherein she states:  
17 "Plaintiff has in fact relied heavily on the BWC recording in much detail to support  
18 her theory of the case..." (Ex Parte, p. 4, lines 13-15). However, a theory is not a  
19 fact. Plaintiff's Opposition does not contain any references/arguments that the BWC  
20 videos support the verified "factual allegations" in Plaintiff's Complaint. Likely, this  
21 is because the Complaint alleges a number of interactions between Plaintiff and the  
22 Defendants which the videos show did not occur.  
23  
24  
25

26 With respect to her Opposition, Plaintiff had every opportunity in her  
27 Opposition to specifically cite to the BWC videos in support of the facts alleged in  
28 her Complaint. The Opposition does not do this. Plaintiff's Opposition does not cite

1 the BWC videos that blatantly contradict her version – her allegations in her  
2 Complaint.

3  
4 Defendants' Response described for the court just how the video evidence  
5 blatantly contradicts Plaintiff's version. It appears that Plaintiff has found herself in  
6 a pickle, since she is requesting that the Court strike Defendants' Response. There  
7 are no reasons whatsoever to support the striking of Defendants' Response.  
8 Moreover, it appears that Plaintiff wants the Court to grant her request for a "sur-  
9 reply" so that she will have another bite at the apple to repeat and elaborate on the  
10 allegations in her Opposition that Plaintiff's version is not contradicted by the BWC  
11 videos, as Defendants' claim and the BWC videos show.  
12  
13  
14

15 **CONCLUSION**

16 Plaintiff's Ex Parte application fails to justify the relief she requests. This  
17 Court should not strike Defendants' Response and should not grant Plaintiff's  
18 request to file a Sur-Reply.  
19

20 DATED: April 10, 2024

FUENTES & McNALLY, LLP

21  
22  
23 By: /s/Raymond J. Fuentes

24 RAYMOND J. FUENTES  
25 Attorneys for the Defendants  
26  
27  
28

/s/ Raymond J. Fuentes  
Raymond J. Fuentes